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No. 06-94

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

FULLER-AUSTIN INSULATION CO.
Petitioner,

v.

HIGHLANDS INSURANCE CO., *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, SECOND APELLATE DISTRICT, DIVISION TWO

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court grant certiorari to review an interlocutory decision of a state intermediate appeal court that presents, in that court's words, only "the state law issues left open by a section 524(g) bankruptcy plan that expressly provides it does not affect the debtor's and insurer's policy rights"?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Certain Underwriters at Lloyd's, London and Certain London Market Insurance Companies (collectively "London Market Insurers") include a number of insurance underwriters and companies that subscribed, severally and not jointly, to insurance policies issued to petitioner Fuller-Austin Insulation Company ("Fuller-Austin"). Pursuant to Supreme Court Rule 29.6, London Market Insurers make the following disclosure with respect to the respondents listed below:

Underwriters at Lloyd's, London

Certain Underwriters at Lloyd's, London are natural persons who are or were members of underwriting syndicates at Lloyd's, London who subscribed, each for their own share and not for the share of others, to stated percentages of policies issued to Fuller-Austin.

Ag De 1830 Comp Belge/ AG Belge

Ag De 1830 Comp Belge / AG Belge is owned by AG Groep.

Allianz International Insurance Company Ltd.

Allianz International Insurance Company Ltd. is now Allianz Cornhill Insurance plc, which is part of the Allianz Group. Its immediate parent is Allianz Aktiengesellschaft.

Camat Per Credit Underwriting Agency Ltd.

Camat Per Credit Underwriting Agency Ltd. is handled by Whittington Insurance Services Ltd. The holding company of Whittington Companies is Omni Whittington Syndicate Services, which is a private limited company.

Dominion Insurance Company Ltd.

The ultimate holding company of Dominion Insurance Company Ltd. is B.D. Cooke Investments, Ltd. Its immediate holding company is Dominion Insurance Holdings, Ltd., a privately held company.

CORPORATE DISCLOSURE STATEMENT – continued

Excess Insurance Company Ltd.

Excess Insurance Company, Ltd. is a wholly-owned subsidiary of the Hartford Financial Services Group, Inc., a publicly held company.

St. Katherine's Insurance Company PLC

St. Katherine's Insurance Company PLC is now part of St. Paul International Insurance Company Ltd., which is part of The St. Paul Travelers Companies.

Storebrand Insurance Company (UK) Ltd.

Storebrand Insurance Company (UK) Ltd. is now Oslo Reinsurance Company (UK) Ltd. It is owned by Oslo Reinsurance Company ASA. The ultimate parent company is Storebrand Skadeforsikring AS.

Stronghold Insurance Company Ltd.

The parent company of Stronghold Insurance Company, Ltd. is Stronghold Holdings Ltd., which is a private limited company.

Taisho Marine & Fire Insurance Company (Europe) Ltd.

Taisho Marine & Fire Insurance Company (Europe) Ltd. is now Mitsui Sumitomo Insurance Company (Europe) Limited, which is owned by Mitsui Sumitomo Insurance Ltd.

Tokio Marine & Fire Insurance Company (Europe) Ltd.

Tokio Marine & Fire Insurance Company (Europe) Ltd. is now Tokio Marine Europe Insurance Ltd. Its immediate parent is The Tokio Marine & Fire Insurance Company Ltd., and the ultimate holding company is Millea Holdings Inc.

Turegum Insurance Company Ltd.

Turegum Insurance Company Ltd. is a wholly-owned subsidiary of Castlewood, Ltd., a private limited company.

Respondent Transcontinental Insurance Company is an insurance company domesticated in the State of New York and has its principal place of business in Chicago, Illinois. Transcontinental Insurance Company is not publicly traded. All of Transcontinental's common stock is owned by National

CORPORATE DISCLOSURE STATEMENT – continued

Fire Insurance Company of Hartford, which is not publicly traded. All of National Fire's common stock is owned by Continental Casualty Company. Continental Casualty Company is not publicly traded. All of Continental Casualty's common stock is owned by The Continental Corporation, which is not publicly traded. All of The Continental Corporation's common stock is owned by CNA Financial Corporation, which has issued shares to the public. Loews Corporation owns the majority of the stock of CNA Financial Corporation and is publicly traded. No other corporation owns 10% or more of the stock of CNA Financial Corporation. CNA Surety Corporation is a publicly held affiliate of Continental Casualty Company.

Respondent Columbia Casualty Company is not publicly traded. All of Columbia Casualty Company's stock is owned by Continental Casualty Company. Continental Casualty Company is not publicly traded. All of Continental Casualty Company's common stock is owned by The Continental Corporation, which is not publicly traded. All of The Continental Corporation's common stock is owned by CNA Financial Corporation, which has issued shares to the public. Loews Corporation owns the majority of the stock of CNA Financial Corporation and is publicly traded. No other corporation owns 10% or more of the stock of CNA Financial Corporation. CNA Surety Corporation is a publicly held affiliate of Continental Casualty Company.

Respondent Stonewall Insurance Company is a wholly owned subsidiary of Stonewall Acquisition Corporation. Stonewall Acquisition Corporation is a wholly owned subsidiary of Dukes Place Holdings, L.P. The following entities have an indirect ownership interest in Dukes Place Holdings, L.P.: Dukes Place Holdings Ltd.; Cavell USA Inc.; Dukes Place Holdings LLC; DP Holdings LLC; Greenwich Street Capital Partners II, L.P.; Greenwich Street Investments II, LLC; The Travelers Insurance Company.

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RESPONDENTS' BRIEF IN OPPOSITION

INTRODUCTION

This petition does not present an issue within this Court's certiorari jurisdiction or that otherwise satisfies this Court's well-established standards for review. The decision below as challenged by petitioner is based entirely on an unremarkable and clearly correct interpretation of California law and the petition does not present any federal issue within this Court's jurisdiction to review. Moreover, the decision below is an interlocutory decision of a state intermediate appellate court that does not present the "final judgment" that is jurisdictionally required under 28 U.S.C. § 1257 for certiorari review of state-court rulings. There is no conflict among the lower courts on any issue of federal law: the supposed conflict claimed by the petition is actually a difference in outcome in cases decided under the laws of two different *states* dealing with different sets of facts. The petition further egregiously misstates both the facts and the ruling of the court below. Finally, the petition's assertions about the supposed importance of the decision below are likewise grossly exaggerated. Pet. App. 23a. In short, the petition presents none of the reasons for granting review and virtually every reason for denying it.

STATEMENT

1. From the 1940s to the 1980s, petitioner Fuller-Austin Insulation Co. was involved in the installation and removal of building materials containing asbestos. Beginning in the late 1980s and accelerating thereafter, petitioner began to face large numbers of personal-injury lawsuits from claimants exposed to its asbestos materials. By 1993, petitioner began to fear that these lawsuits might exhaust the policy limits of its primary layer of liability insurance coverage. It therefore sent letters to respondents — insurance companies which had issued excess insurance policies that

could potentially apply only after petitioner's liability for covered claims exceeded primary and underlying insurance limits — putting them on notice of the asbestos claims. After several of the excess insurers responded by asking for additional information or reserving rights, petitioner filed a coverage action against respondents in California state court under California law seeking to establish the fact and scope of coverage for "past, present and future" asbestos claims. Pet. App. 4a-6a.

2. While the coverage litigation was pending, petitioner began negotiating a so-called "prepackaged" bankruptcy plan with certain selected plaintiffs' lawyers representing asbestos claimants. Respondents were not represented in these negotiations and petitioner did not seek their approval either of the negotiations or of the plan that ultimately emerged. Pet. App. 7a-8a.

Negotiating in respondents' absence, petitioner and the asbestos plaintiffs' lawyers devised a bankruptcy Plan under which respondents would be called upon to pay the overwhelming bulk of the money. Under the Plan, petitioner's parent company would pay "approximately $14 million in cash and other assets," petitioner would "contribute[] its insurance policies as well as its continued prosecution of [the] coverage action," and petitioner and its parent company would receive "a full release and injunction barring any further litigation against them concerning present or future asbestos claims." Pet. App. 9a. The respondents, on the other hand, were to be held responsible for some hundreds of millions of dollars. Pet. App. 16a. To assist in the pursuit of this amount, the Plan contrived payment provisions designed to create the appearance of massive liability. Each asbestos claim would be nominally assigned a high "allowed liquidated value" or "ALV," but these ALVs were entirely notional: the Plan "expressly provided that a claimant would receive only a periodically adjusted 'Payment Sum Percentage' of the ALV . . . that would amount to only a fraction of

the ALV." Pet. App. 9a.[1] The original Plan (prior to the modification discussed below) further provided that the bankruptcy court would, on the basis of these "ALV" numbers, "determine an aggregate amount" that petitioner would ostensibly "be legally obligated to pay." Pet. App. 9a-10a.

3. On September 4, 1998, after the Plan was fully negotiated, petitioner filed for protection in the District of Delaware, seeking confirmation of the Plan under section 524(g) of the Bankruptcy Code, 11 U.S.C. § 524(g). The Plan was then sent to respondents, who received it "approximately two weeks after the filing." Pet. App. 8a. Respondents immediately filed objections to the Plan and sought to intervene in the bankruptcy proceedings. Pet. App. 10a.

In response, petitioner quickly amended the Plan to delete the provision requiring the bankruptcy court to determine an aggregate amount of petitioner's alleged asbestos exposure, Pet. App. 10a, and to "expressly provide[] [that the Plan] does not affect [respondents'] policy rights" as interpreted in accordance with "state law." Pet. App. 23a. The amendment added the following explicit provision:

> Notwithstanding any other provision in this Plan, all claims and defenses of any Asbestos Insurance Company that is a party to the Coverage Litigation [*i.e.*, the previously pending California state-court coverage suit] shall be adjudicated in the Coverage Litigation, and all rights of the Asbestos Insurance Companies under the Asbestos Insurance Policies shall remain *unaffected* by the Plan and the [bankruptcy court's] Confirmation Order.

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[1] The notional ALV amounts recited in the Plan were in fact more than five times greater than the actual amounts petitioner had historically paid to settle claims. Reflecting that reality, the "Payment Sum Percentage" — *i.e.*, the "fraction" of the ALVs that the trust established by the Plan is actually obligated to pay to claimants — is now set at 18.5%.

— Pet. App. 10a (emphasis added).

Petitioner then urged the bankruptcy court to deny respondents' intervention motion for lack of standing, arguing that this amendment to the Plan meant that respondents "simply do not have any interest as affected by this plan of reorganization." Pet. App. 11a. As the court below found, "[d]uring the course of the bankruptcy proceedings, the bankruptcy court and all parties repeatedly represented that the Plan would have no impact on [respondents'] claims and defenses in the coverage litigation." Pet. App. 42a-43a; *see also* Pet. App. 44a (describing petitioner's "repeated representations that the Plan and its confirmation did not affect [respondents'] rights under their policies or their claims and defenses in the coverage litigation"). As petitioner's counsel told the bankruptcy court: "I think we have made perfectly clear in our amendment to the plan of reorganization that [respondents'] rights are not affected, and we have made perfectly clear in our amended plan that their claims and defenses in the [California] coverage litigation [are] not affected." Pet. App. 11a-12a.[2]

On the basis of these representations, the bankruptcy court ruled that respondents lacked standing to intervene, reasoning that they "were 'not directly and pecuniarily affected by the proposed Plan.'" Pet. App. 12a. Accordingly, the bankruptcy court did not take up or rule upon whether the Plan was "unfair, unreasonable or the product of fraud or collusion" as to respondents. Pet. App. 44a-45a. Instead, the bankruptcy court went on to confirm the Plan in a Confirmation Order explicitly "providing that [respondents'] rights

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[2] *See also* Pet. App. 11a ("What we have done [through the amendment to the Plan is] to make it clear, to the extent there is any doubt . . . that all of their rights under those policies are unaffected by the plan of reorganization"; "[w]e have tried to make clear . . . that these proceedings have absolutely no impact on the [coverage litigation] proceedings in California in terms of the claims and defenses that those carriers have raised and are litigating in California.").

under their policies were to remain unaffected by the Plan." Pet. App. 12a.

4. After thus securing confirmation of the Plan on this basis, petitioner abruptly made a 180 degree turn. It "adopted a position [in the California coverage litigation that] it did not take in the bankruptcy proceedings": that the Plan *did* dramatically affect respondents' rights. Pet. App. 13a. Petitioner claimed: *First*, that even though there had been no trial and even though respondents had not agreed to the Plan, the Plan nonetheless was a "final judgment . . . after actual trial" or an "agreement of the Insured, claimant, and the [insurer]" that gave rise to obligations under respondents' policies to indemnify petitioner's liability under the Plan. Pet. App. 5a;[3] *Second*, that the policies required that respondents' coverage obligations be determined on the basis of the Plan's notional ALVs, and not the fraction of the ALVs that the claimants were actually designated to receive, Pet. App. 14a, 54a; and *Third*, that the jury should determine the aggregate estimated amount of all present and future asbestos claims against petitioner with respondents then being liable to pay that total amount up-front — *i.e.*, long before *any* payment would be made to the overwhelming majority of asbestos claimants.[4] Pet. App. 14a. Petitioner expressly sought these rulings under California law.

The trial court ruled in petitioner's favor on all of these issues. It held that the Plan was both a "final judgment" and an "agreement" within the meaning of the policies, and that

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[3] The relevant policy language provides that respondents have no obligation to indemnify petitioner until "after the Assured's liability shall have been fixed and rendered certain either by final judgment against the Assured after actual trial or by written agreement of the Assured, the claimant, and [insurer]." Pet. App. 25a.

[4] The state-court jury would ultimately determine that over 75% of the total dollar amount of claims constituted "future claims." Pet. App. 16a.

respondents' indemnity obligations were to be measured on the basis of the ALVs. It further held that — even though the policies would ordinarily obligate respondents to indemnify petitioner's covered liability to individual claimants only as those claims actually arose and were resolved over the years — the advent of the Plan meant that respondents were now obligated under the policies to pay an up-front lump-sum based upon a projected statistical estimate of the total ALVs assigned to all pending and projected future asbestos claimants who might come forward. Pet. App. 13a-14a. In a subsequent phase of the trial court proceedings, a jury acting pursuant to the trial court's instructions — one of which was that the jury should "presume" that *all* of the asbestos claims were "harm within the coverage provided by [respondents'] insurance policies" — projected this total amount to be just short of $1 billion. Pet. App. 15a-16a.

5. The California Court of Appeal affirmed in part and reversed in part. It began by noting the state-law nature of the issues in the case, explaining that its task was to "resolv[e] the state law issues left open by a section 524(g) bankruptcy plan that expressly provides it does not affect the debtor's and insurer's policy rights." Pet. App. 23a.

Accordingly, the Court of Appeal applied "California law" in addressing these issues. Pet. App. 25a, 33a, 34a, 47a, 56a. *First*, it held that the Plan constituted a "settlement," and thus did not comprise a "final judgment . . . after actual trial." It also held that this "settlement" would not be an "agreement of the Insured, claimant, and the [insurer]" within the meaning of the policies unless it were first found not to be "unfair, unreasonable or the product of fraud or collusion" as to respondents. Pet. App. 29a, 42a-45a. Because the bankruptcy court — relying on petitioner's representations that the Plan did not affect respondents' rights — had specifically not considered this issue, the Court of Appeal remanded the case for the trial court to make this determination. Pet. App. 44a-45a. Moreover, in connection with this remand, the Court of Appeal also made clear that the trial court's instruction that the jury should "presume"

that the asbestos claims were "harm within the coverage" of the policies was erroneous, and thus that petitioner — even if it succeeded in showing that the Plan is fair, reasonable, non-fraudulent and non-collusive — also needed to prove on remand that the asbestos claims at issue were "harm within [the] coverage." Pet. 62a-67a.

Second, the Court of Appeal held that, because the policy language limits respondents' indemnity obligations only to "amounts [petitioner] is 'obligated to pay' by law," any coverage obligations found to exist after remand were to be determined only on the basis of amounts that the trust set up by the Plan was actually obligated to pay each claimant. Pet. App. 54a-60a. On this point, the Court of Appeal concluded that the Plan "expressly and unambiguously" provided that this amount was the payment sum percentage each claimant was designated to receive, and *not* the notional ALVs, Pet. App. 58a: "[T]he ALV does not reflect Fuller-Austin's legal obligation to each claimant and therefore cannot be used as the basis for fixing appellants' indemnity obligations." Pet. App. 56a.

Third, the Court of Appeal ruled that for the trial court to have held respondents liable to pay up-front the "jury's estimation of the value of present and potential future asbestos claims" against petitioner was an "unlawful acceleration" of respondents' contractual obligations to indemnify Fuller-Austin. Pet. App. 45a-46a.

In sum, the Court of Appeal held the following: If the Plan were determined on remand or subsequent appeal to be "unfair, unreasonable or the product of fraud or collusion," respondents would have no coverage obligations at all arising out of any part of the Plan. If not, and if petitioner proved that the asbestos claims at issue are harm within the policies' coverage, respondents' coverage obligations would be based on the payment sum percentage amounts that claimants were actually paid under the Plan when such payments were made. Pet. App. 60a, 67a.

Petitioner sought review from the California Supreme Court only on the second of the three issues described

above. *See* Petition for Review of plaintiff Fuller-Austin Insulation Co., filed Feb, 28, 2006 (Cal. Sup. Ct.), at 12 & n.2.[5] It did *not* seek review of the Court of Appeal's remand for a determination whether the Plan was unfair, unreasonable, fraudulent or collusive as to respondents *or* as to the court's holding that respondents do not have to pay projected coverage obligations in an up-front lump sum. On April 19, 2006, the California Supreme Court denied review in all respects. Pet. App. 264a. Petitioner then filed this petition with this Court, seeking review *only* of the California Court of Appeal's ruling that respondents' coverage obligations — should they have any after the remand proceedings — are not to be based on the ALVs.

REASONS FOR DENYING THE WRIT

The petition seeks review of an interlocutory ruling of a State intermediate appellate court that was decided on state-law grounds. For a number of reasons, there is no warrant — or, indeed, jurisdiction — for this Court to grant certiorari in this case.

1. ***The petition does not present a federal-law issue.***— The petition should be denied because, as the California Court of Appeal made unmistakably clear, the decision below is based entirely on state law. No federal question is presented in the case and the Court accordingly lacks jurisdiction for this reason. *See* 28 U.S.C. § 1257(a); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.").

As set forth more fully above, the issue on which petitioner seeks review is whether, under the terms of respondents' insurance policies, the policy language providing that

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[5] Petitioner also sought review of the Court of Appeal's holding that the trial court's instruction that the jury should "presume" harm within the coverage was erroneous.

respondents are to indemnify petitioner only for "amounts it is 'obligated to pay' by law" requires respondents to pay the notional ALV amounts, rather than the small fraction of those amounts that the Plan actually obligates the trust to pay to asbestos claimants. Pet. App. 54a-55a. Contrary to the petition's attempt to suggest that the California Court of Appeal somehow rested its resolution of this issue on a construction of section 524(g) of the Bankruptcy Code, the opinion below makes perfectly clear that the decision is based entirely on state insurance law. Pet. App. 23a (this case concerns "the *state law issues* left open by a section 524(g) bankruptcy plan that expressly provides it does not affect the debtor's and insurer's policy rights") (emphasis added). Accordingly, the Court of Appeal determined — expressly applying "California law" (Pet. App. 56a) — that the policies' provision limiting indemnification to amounts petitioner is "obligated to pay" meant that respondents would be required to reimburse only amounts that the trust was actually obligated to pay to claimants under the Plan, and not the more-than-five-times-higher ALVs. Pet. App. 55a-58a. Petitioner may disagree with the California court's interpretation of California law, but that state-law dispute is not a matter for this Court's review.

Moreover, despite the petition's cursory reference to two of this Court's preemption cases (Pet. 23), this case does not and could not present any issue that a section 524(g) bankruptcy plan somehow preempts the California insurance law that governs the policies and retroactively abrogates respondents' state-law contractual rights under the policies. In the first place, no claim was raised in the court below that section 524(g) preempts California insurance law or abrogates respondents' California-law rights under the policies.[6]

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[6] *See* Appeal Brief of Fuller-Austin Insulation Co., filed April 22, 2005 (Cal. Ct. of Appeal), at 50-54 (arguing that respondents' obligations should be based on the ALVs as a matter of "the policy language, California law, and insurance industry custom and practice," and not raising any preemption claim).

See, e.g., Adams v. Robertson, 520 U.S. 83, 86 (1997) (this Court will not review a federal question raised by a state-court judgment unless that question was properly presented to the state courts). More fundamentally, on the facts of this case, no such claim could have been raised. As fully detailed above, both the 524(g) Plan in this case *and* the bankruptcy court order confirming it expressly *disclaimed* any intention here to affect or alter respondents' rights under the policies as interpreted in accordance with state law: as the California Court of Appeal noted, both the Plan and the bankruptcy court confirmation order had explicitly provided that "[respondents'] rights under their policies were to remain unaffected by the Plan." Pet. App. 12a; *see* pp. 3-5, *supra*.[7]

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[7] Although petitioner's failure to raise any such issue below and the Plan's and the bankruptcy court's express disavowal of any intent to preempt or abrogate respondents' state-law contractual rights foreclose any such claim here, it should also be noted that a claim that section 524(g) preempts state insurance law and retroactively abrogates insurers' state-law contractual rights would be totally without merit for other reasons as well. The sole reference in section 524(g) to insurance or insurers is a provision that, far from imposing extra-contractual obligations on insurers, actually *confers rights upon insurers*. 11 U.S.C. § 524(g)(4)(A)(ii)(III) (authorizing a bar on further asbestos claims against insurers who contribute to the trust). Moreover, although section 524(g) requires that the trust value and pay "present claims and future demands . . . in substantially the same manner" (11 U.S.C. § 524(g)(2)(B)(ii)(V)), nothing in the section suggests that, in order to satisfy the goal of equal treatment, insurers are required — policy provisions notwithstanding — to pay out *more* than the trust is obligated to disburse to claimants. Section 524(g) thus does not contain any language that could even remotely be described as preempting state insurance law or abrogating insurers' contractual rights, let alone language clear enough to overcome: (1) the general "presumption against the pre-emption" of state law (*e.g., Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)); (2) the further specific *anti*-preemption provision of the McCarran-Ferguson Act, which bars preemption of state laws "relat[ing] to" the regulation of the "business of insurance" (15 U.S.C. § 1012(a));

2. *The interlocutory nature of the California Court of Appeal's ruling renders the petition beyond this Court's certiorari jurisdiction and otherwise unfit for review.*— The petition should also be denied because, although the issue raised will not be certworthy at any juncture of the case, review is particularly inappropriate at this interlocutory stage of the proceedings. As the petition concedes, "the decision below is . . . interlocutory." Pet. 14. As detailed above, in a ruling that petitioners do not challenge, the California Court of Appeal remanded this case to the trial court for a determination whether the Plan is "unfair, unreasonable or the product of fraud or collusion" as to respondents. Pet. App. 45a. If the trial court determines that it is any of the above, petitioner does not contest that respondents will then have no obligations under their insurance policies arising out of the Plan.[8] In that event, peti-

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or (3) the settled rule that a statute will not be construed to impose obligations on private parties retroactively absent a "clear" statement of such intent in the statutory language (*e.g.*, *Landgraf v. USI Film Products*, 511 U.S. 244, 268-272 (1994)). And it goes without saying that any attempt to construe section 524(g) as abrogating insurers' contractual rights and imposing extra-contractual liability on them retroactively would, at a minimum, raise substantial constitutional questions under the takings and due process clauses. *See, e.g.*, *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998).

[8] Given the provisions of the Plan, the manner in which it was negotiated and petitioner's misrepresentations of its intentions before the bankruptcy court (*see* pp. 2-5, *supra*), respondents submit that it is quite likely that the Plan will be found on remand to be unfair, unreasonable, fraudulent or collusive as to respondents, and that this case will therefore end there. The large potential for collusion and unfairness in this sort of situation — where an asbestos defendant and some selected plaintiffs' lawyers negotiate a pre-packaged asbestos arrangement without the insurers' participation, but which calls for the insurers to supply almost all of the money — is both obvious and well-recognized. For one recent example, *see In re Congoleum Corp.*, 426 F.3d 675 (3d Cir. 2005). We note that petitioner and certain respondents affiliated with Hart-

tioner does not dispute that the issue it raises — whether the California Court of Appeal correctly interpreted the extent of one aspect of respondents' alleged obligations under their policies if the Plan gives rise to any such obligations — would be moot. Other issues remain to be sorted out on remand as well, including whether petitioner can satisfy its burden of proving that the asbestos claims are harm within the policies' coverage.

Because the petition thus arises from a state-court ruling that petitioner concedes is interlocutory, this Court lacks jurisdiction to grant review for this reason as well. Under 28 U.S.C. § 1257(a), this Court's certiorari jurisdiction over state-court decisions is limited to "[f]inal judgments or decrees." This statutory limitation on certiorari jurisdiction "establishes a firm final judgment rule." *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997). Accordingly, "[t]o be reviewable by this Court, a state-court judgment must be final . . . as an effective determination of the litigation and not of merely interlocutory or intermediate steps therein." *Id.*

As the Court has emphasized, this "finality rule 'is not one of those technicalities to be easily scorned. It is an important factor in the smooth working of our federal system.'" *Id.* (*quoting Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)). As a result, "[i]n general, the final-judgment rule has been interpreted to preclude reviewability . . . where anything further remains to be determined by a State court." *Flynt v. Ohio*, 451 U.S. 619, 620 (1981). The Court has thus repeatedly dismissed writs of certiorari for want of jurisdiction where, as here, a state court has remanded for further trial proceedings or fact-finding that could moot the issue raised in the petition. *See, e.g., Jefferson*, 522 U.S. at 81-82 (remand for "trial on the merits" that

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ford Insurance Co. (which have relatively small exposure to the Fuller-Austin risk and which have opted not to respond to the petition) have entered into a structured settlement such that they will not be participating in the trial court proceedings upon remand.

"could effectively moot" the issue presented by the petition); *O'Dell v. Espinoza*, 456 U.S. 430 (1982) (per curiam) ("Because the Colorado Supreme Court remanded this case for trial, its decision is not final as an effective determination of the litigation.").

Although acknowledging that the judgment below is interlocutory, petitioner makes no attempt to address how this Court nonetheless has jurisdiction to grant review. The only reason petitioner gives why this Court should grant review despite the conceded interlocutory nature of the decision below is an appeal to the "exigency of the asbestos litigation crisis." Pet. 14. Nowhere does petitioner explain how this "exigency" empowers the Court to hear cases in excess of its settled jurisdiction.[9]

Moreover, beyond this jurisdictional bar, the interlocutory nature of the decision presents other reasons why the petition should not be granted. Even where petitions from decisions of the lower *federal* courts are concerned — where this Court's certiorari jurisdiction is *not* limited to final judgments, *see* 28 U.S.C. § 1254(1) — this Court adheres to an ordinary practice of denying review of interlocutory deci-

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[9] Certainly the petition makes no attempt to contend that this petition falls within "the limited set of situations in which [the Court] ha[s] found finality . . . despite the ordering of further proceedings in the lower state courts." *Jefferson*, 522 U.S. at 82. Nor could it. This is not a situation where the issue raised by the petition "will survive and require decision regardless of the outcome of future state-court proceedings." *Id.* To the contrary, petitioner does not dispute that if respondents prevail on remand below, the issue raised by the petition will be moot. Nor is this an instance where the issue raised by the petition "has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Id.* If petitioner prevails on remand, it can then pursue further review of the issue raised in the petition at that time (although we emphasize that the issue will remain unworthy of this Court's review, among other reasons because it is not an issue of federal law).

sions. *See, e.g., Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree," so the interlocutory nature of the decision below is "a fact that of itself alone furnished sufficient ground for the denial of the application" for review by this Court).[10] Once again, the petition provides no reason why this state-law decision by a state intermediate appellate court should be considered an "extraordinary case." To the contrary, the various reasons cited for the Court's practice of awaiting final judgment — including avoidance of what would be an advisory opinion if further proceedings mooted the issue raised in the petition, avoidance of deciding alleged constitutional questions in advance of the necessity of doing so, and allowing the Court to assess any federal-law issue upon a complete and settled record[11] — all counsel in favor of denying interlocutory review here.

3. ***There is no conflict of federal law with the UNR case.***— Contrary to the petition's claim, there is no conflict of federal law between the California Court of Appeal's decision and *UNR Industries, Inc. v. Continental Cas. Co.*, 942 F.2d 1101 (7th Cir. 1991). The two decisions were each expressly decided not on the basis of federal law, but on the basis of the respective state laws governing the issues here

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[10] *See also Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for a writ of certiorari is denied."); Robert L. Stern & Eugene Gressman, *et al.*, SUPREME COURT PRACTICE § 4.18, at 260 (8th ed. 2002) ("[I]n the absence of some . . . unusual factor, the interlocutory nature of a lower court judgment will generally result in a denial of certiorari.").

[11] *See, e.g., Radio Station WOW*, 326 U.S. at 123-24; *North Dakota Pharmacy Bd. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973); William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983).

presented under the respective policies: this case under "California law," and *UNR Industries* under "Illinois law." See Pet. App. 23a, 56a; *UNR Industries*, 942 F.2d at 1104 ("UNR and the other parties have relied on Illinois law. We follow their lead . . . ."); *id.* at 1105 (stating, in the portion of the opinion relied upon by petitioner, that the ruling is based on interpretation of "Illinois law"). Indeed, the *UNR Industries* opinion could hardly be clearer that it was not announcing a rule of federal law, expressly stating at the very outset that no "federal interests are present in the current case, so *state law applies*." *Id.* at 1104 (emphasis added).[12] So when the California Court of Appeal said — in a sentence the petition wrenches out of context — that it would "decline to follow *UNR Industries* on this point," it was at most declining to import the Seventh Circuit's application of its interpretation of Illinois insurance law principles to one set of policies and facts into the application of California insurance law to another set of policies and facts. Pet. App. 60a. Of course, a difference in result produced by application of two state laws to separate policies under the facts and circumstances in the two cases is wholly unremarkable — and in any event cannot create a basis for this Court's review.

4. ***The petition badly distorts the actual decision below.***— Although the merits of the California Court of Appeal's determination of the state-law issues presented in this case are of no relevance here, it does bear brief mention that the petition's outlandish depiction of that determination has little resemblance to what the court below actually held.

Most fundamentally, the California Court of Appeal did *not* hold that respondents would "otherwise" have far higher "underlying liability," but that they should receive a "windfall" in the form of "a discount of their own liability as a result of the trust's obligation to comply with Section 524(g)."

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[12] Indeed, the *UNR Industries* opinion could not possibly have been based on section 524(g), since that section was not even enacted until three years after the case was decided.

Pet. 15-16. To the contrary, the court ruled — in a straightforward application of basic rules of contract law — that the policies' specification that respondents are required to reimburse petitioner only for "amounts it [*i.e.*, petitioner] is 'obligated to pay' by law" means that respondents have to reimburse only amounts that petitioner through the trust is actually obligated to pay to claimants under the Plan, and not the far-higher non-payable ALVs. Pet. App. 55a-58a. There was thus no "discounting" of respondents' obligations: they are simply responsible for reimbursing the "amounts" petitioner is "obligated to pay."[13] And if ultimately the total of the amounts actually paid out by the trust to present and future asbestos claimants for covered claims reach the policy limits, respondents would be required to pay out the full limits. There is no "windfall" or "discount" here.

The petition suggests otherwise only by blatantly manipulating a supposed quote from the opinion below. The linchpin of the petition's claim of a "discount" is the assertion that the California Court of Appeal supposedly held that, under the Plan, the full "ALV amounts . . . 'constitute a *binding liability of Fuller-Austin to the asbestos claimants.*'" Pet. 16-17 (quoting Pet. App. 67a) (emphasis in petition). Based on this assertion, the petition contends that, in requiring respondents to reimburse only what the trust actually pays to claimants, as opposed to the higher ALV amounts it supposedly had a "binding liability" to pay, the opinion below "discounts" respondents' supposed obligations. Pet. 15-17.

On inspection, however, the quoted "binding liability" language is *not* an expression of the *California Court of Appeal*'s views. To the contrary, the quoted language is actually a fragment from one sentence of the California Court of Appeal's recital of the *trial court's jury instructions*, which

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[13] As the California Court of Appeal pointed out, it is thus *petitioner*, not respondents, which seeks to use the bankruptcy filing to "redefine the scope of coverage" by contending that the Plan means that respondents have payment obligations greater than those called for by the policies' terms. Pet. App. 56a.

the appellate court was reciting for background purposes in an entirely different section of its opinion dealing with an entirely separate issue from that raised by the petition — a separate issue on which the appellate court similarly reversed the jury's verdict as "fatally defective." Pet. App. 67a-70a. Indeed, in the section of its opinion that actually deals with the issue raised by the petition, the California Court of Appeal *specifically rejected* the trial court's view that "the ALV of each claim is the amount of Fuller-Austin's legal obligation." Pet. App. 58a. In doing so, the appellate court expressly and repeatedly held just the opposite: that the Plan "establish[es] that the ALV does *not reflect Fuller-Austin's legal obligation to each claimant.*" Pet. App. 56a (emphasis added); *see also id.* at 58a ("[W]e read the Plan as expressly and unambiguously permitting the Trust's obligations to be satisfied by the payment sum percentage" and as providing "that the ALV is not binding."); *id.* ("[W]e do not read the Plan . . . as providing that Fuller-Austin's legal obligation to each claimant is the ALV amount.").

5. ***The petition greatly exaggerates the supposed importance of the decision below.***— Finally, the petition's dire descriptions of the decision below as posing a "threat" to "cripple[]" federal asbestos policy and the "entire statutory regime" (Pet. 7, 14, 18) are fanciful. The opinion below is not only an unremarkable determination of state law, it is the first and only case of its kind to have arisen in the 12 years since enactment of section 524(g). Pet. App. 23a (this is the first case "in the state courts resolving the state law issues left open by a section 524(g) bankruptcy plan that expressly provides it does not affect the debtor's and insurer's policy rights"). Petitioner's hyperbole aside, the decision below thus presents no demonstrably recurring issue having a demonstrable systemic impact on the nation. If in the future, asbestos insurance cases do arise that do fit that description and that actually do present a federal-law issue, the Court could consider whether to review them at that time. But that speculative possibility supplies no reason — nor does it supply the missing jurisdictional basis — for this Court to grant review now of an interlocutory decision of a

state intermediate appellate court that was decided entirely on state-law grounds and that presents no conflict or even an issue of federal law.

CONCLUSION

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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